

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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MM Docket No. 87-268

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service that is commensurate with the expanded capacity provided by digital technology. But the broadcasters reject the notion that they must provide any more public service than they do currently.

As MAP, *et al.* have observed, the principle that broadcasters must compensate the public in return for free use of the spectrum is not only part of the fabric of the Communications Act, but it is specifically reinforced three times in Section 336 of the Telecommunications Act of 1996, Pub. L. 104-104 ("1996 Act"). 47 USC §336; MAP, *et al.* Petition at 3-10. In remarkably defensive tones, ALTV and MSTV claim that the Commission can do little more than make a general, yes/no determination that a broadcaster's digital TV service meets the public interest. Similarly, ALTV and MSTV deny any responsibility on the part of licensees to prove that they are even financially prepared to build and to operate these stations. Thus, they view these second channels as a mere entitlement, completely devoid of any requirements or obligations.

MAP, *et al.* urge the Commission, as the guardian of the public interest, to recognize the immense value that has been transferred to broadcasters, and to demand both new public service obligations and proof that broadcasters are financially qualified to make the conversion to digital TV.

I. THE COMMISSION MUST DEMAND INCREASED PUBLIC INTEREST OBLIGATIONS IN RETURN FOR GRANTING FREE ADDITIONAL SPECTRUM FOR DIGITAL TELEVISION.

ALTV argues that the Commission is neither required, nor has the authority, to adopt new public interest requirements for digital television. It asserts that the three specific references in Section 336 that the new digital services must serve the public interest are nothing more than legislative restatements that broadcasters have not been relieved of their previous obligation to

operate generally in the public interest. ALTV Opposition at 2-3. It continues that the "fundamental limits on the Commission's authority" allow it "only very general...oversight of broadcasters' programming performance." *Id.* at 4. ALTV also asserts that Congress did not intend that subscription programming services be subject to public interest obligations. *Id.* at 6-7.

These arguments not only ignore the central point of MAP, *et al.*'s Petition, but they rely upon a distorted reading of Section 336 of the 1996 Act.

A. The Commission Has Both The Mandate And The Authority To Require New Public Interest Obligations For Digital Television.

ALTV asserts that the Commission has neither the mandate nor the authority under the Communications Act to require that programming services on the digital channels be subject to new and specific public interest obligations. It argues that Sections 336(a) and (b) of the 1996 Act "speak only to ancillary and supplementary services," and therefore "confer no authority or obligation on the Commission's part to adopt any new or specific public interest programming requirements for DTV services." ALTV Opposition at 2-3. As for Section 336(d), ALTV claims that it only ensures that a station is not relieved from its *existing* obligation to operate in the public interest. *Id.* at 3. It concludes that without more specific statutory language, the Communications Act does not give the Commission authority to establish specific public interest obligations. *Id.* at 5.

What is most remarkable about these arguments is that they completely fail to address MAP, *et al.*'s most fundamental point: under the Communications Act of 1934, the receipt of free public spectrum, exclusive of all other parties, is conditioned upon explicit inseparable public interest obligations. MAP, *et al.* Petition at 4-7. This requirement dates back to the Radio Act of 1927, but it is no less important today. *Id.*

Notwithstanding ALTV's incomplete reading of Section 336, this principle was reinforced thrice by Congress. In dismissing Section 336(d) as only applying existing obligations, ALTV ignores the plain text of the statute. It completely fails to mention the second sentence of that section, which requires that:

In the Commission's review of any application for renewal of a broadcast license for a television station that provides ancillary or supplementary services, the television licensee shall establish that *all of its program services on the existing or advanced television spectrum are in the public interest.*

1996 Act, §201; *codified at* 47 USC §336(d). This language explicitly applies public interest obligations to each program service, and, significantly, does not limit the scope of these obligations to existing public interest requirements. Instead, it allows the Commission to exercise its longstanding discretion to define what constitutes the public interest for digital TV services.

ALTV also objects that there are "[n]o new obligation[s]...specified" in Section 336(d), so Congress must have only meant to extend the existing level of oversight. ALTV Opposition at 3. Not only does this interpretation ignore Congress mandate that the Commission apply the public interest standard to new programming services, *see* discussion, *infra* at 7, but it also ignores the Commission's authority to define public interest obligations. Taken to its logical conclusion, ALTV's argument militates against the Commission ever having *any* ability to modify its obligations without prior, specific Congressional approval. The Commission should reject ALTV's attempt to frustrate Congressional intent and to construe its authority so narrowly.

Furthermore, ALTV's argument that Congress merely chose to restate the current public interest obligations would transform Section 336(d) into mere surplusage. ALTV Opposition at 3. ALTV fails to account for the Commission's assessment that the Communications Act *already* requires the application of the public interest standard to digital television, and would therefore

run afoul of the principle of statutory construction that no part of a statute should be interpreted as being "inoperative or superfluous, void or insignificant." MAP, *et al.* Petition at 8-9, *citing Fifth R&O* at ¶45, Sutherland on Statutory Construction (1994) at §46.06.

Moreover, as MAP, *et al.* have noted, Sections 336(a) and (b) provide yet another statement of Congress intent that new public interest obligations should apply to programming services. ALTV dismisses them, arguing that Section 336(b)(5) is a mere adjunct to 336(a), and that neither has anything to do with programming requirements. ALTV Opposition at 2-3. But ALTV barely addresses the text of 336(b)(5), which gives the Commission broad, expansive authority to "prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity." 47 USC §336(b)(5). In no way is this language limited to ancillary and supplementary services as ALTV argues. Ancillary and supplementary services are subject to nearly identical public interest language in Section 336(a)(2), and ALTV's interpretation would render the Section 336(b)(5) public interest requirement superfluous.

B. The Supreme Court's *CBS v. DNC* And *Turner* Decisions Promote, Rather Than Preclude, The Commission's Regulation Of Broadcasters In The Public Interest.

ALTV also claims that the Commission has no legal authority to adopt specific public interest programming requirements. Quoting *CBS, Inc. v. Democratic National Committee*, it focuses on the Supreme Court's statement that government power over broadcast licensees is "carefully circumscribed" by the Communications Act. ALTV Opposition at 4, *citing CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 126 (1972) ("*CBS v. DNC*"). ALTV also cites *Turner Broadcasting System, Inc. v. FCC* for the proposition that the FCC's oversight does not allow the Commission to regulate content of broadcast programming. ALTV Opposition at 4,

citing *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2463 (1994).

ALTV's interpretation of these cases takes them light years beyond their narrowly drawn holdings. In *CBS v. DNC*, the Court considered only whether the Commission properly declined to adopt an additional, new program obligation. *CBS v. DNC*, 412 U.S. at 97. In deciding that neither the First Amendment nor the public trustee scheme of the Communications Act compelled such actions, the Court did not diminish or alter the public trustee system of broadcast regulation. To the contrary, it declared that this system contains "administrative flexibility to meet changing needs and swift technological developments." *Id.* at 121. And, pointing to that ratification, the Court expressly upheld a much more prescriptive measure just a few years later. *CBS, Inc. v. Federal Communications Commission*, 453 U.S. 367 (1981) (upholding Section 312(a)(7) reasonable access provisions and FCC's implementation of those provisions).

ALTV relies on a similarly distorted reading of *Turner*. In *Turner*, the Court distinguished broadcasting from other media, stating that broadcast programming "is subject to certain limited content restraints imposed by statute and FCC regulation...." *Turner*, 114 S.Ct. at 2462. It gave specific examples such as children's programming, indecent programming, and political programming. *Id.* *Turner* strongly reaffirmed the core proposition of *MAP, et al.*'s Petition, that:

the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations on broadcast licensees.

Id. at 2457. Just this year, the Supreme Court unanimously reaffirmed that principle. *Reno v. ACLU*, No. 96-511, 22-23 (S.Ct. June 26, 1997).

C. Congress Application Of Public Interest Obligations To Subscription Services Shows A Clear Intent To Overrule The Commission's *Subscription Video* Decision.

In claiming that there is no requirement that the Commission adopt public interest obligations for subscription programming services, ALTV and MSTV argue that the language and legislative history of the 1996 Act show no Congressional intent to overturn the Commission's *Subscription Video* decision. MSTV Opposition at 33, ALTV Opposition at 7, citing *Subscription Video*, 2 FCC Rcd 1001 (1987), *affd sub nom. National Association for Better Broadcasting v. FCC*, 849 F.2d 665 (DC Cir. 1988).

But the plain language of Section 336(d) refutes this argument. Section 336(d) applies public interest obligations to "*all*" program services on the existing and advanced spectrum. 47 USC §336(d); *Fifth R&O* at ¶¶47-48 (emphasis added). This language clearly applies public interest obligations to each programming service and is not limited to free services. Contrary to ALTV's and MSTV's claims, there is no requirement that Congress, having clearly expressed its intent, restate the obvious and explicitly declare that it intends to overturn *Subscription Video*.

Finally, the Commission should reject ALTV's suggestion that the payment of spectrum fees for subscription programming or non-program services would relieve broadcasters of public interest obligations. ALTV Opposition at 7. The plain language of the 1996 Act demonstrates Congress' intent that broadcasters pay fees for nonbroadcast services and also that these services be subject to public interest obligations. Congress required fees in Section 336(e) and also stated that "nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity." 47 USC §336(d).

II. THE COMMISSION IS OBLIGATED AS A MATTER OF LAW AND POLICY TO REQUIRE DIGITAL TV APPLICANTS TO PROVE THAT THEY ARE FINANCIALLY QUALIFIED TO MAKE THE CONVERSION TO DIGITAL TV.

ALTV and MSTV also oppose any requirement that an applicant for a digital TV license make a showing that it is financially qualified to hold that license. ALTV Opposition at 6; MSTV Opposition at 34. MSTV argues that any requirement for broadcasters to prove their financial qualifications should be dismissed so long as broadcasters certify their intention to build DTV facilities, because the Commission can rely upon broadcasters' track record as licensees. MSTV Opposition at 34. ALTV fears that financial certification would "needlessly expos[e] highly proprietary station financial information to competitors," cause "endless[]" delays in licensing, and "tie up...Commission resources." ALTV Opposition at 6. Instead, they both suggest that instances of malfeasance could be addressed with sanctions imposed on a case-by-case, *ad hoc* basis. *Id.*; MSTV Opposition at 34.

The Commission should reject these policy arguments, because broadcasters must obtain a *new* construction permit and a *new* license to construct digital TV facilities, *Fifth R&O* at ¶¶67-75, and therefore they are required by Section 308(b) of the Communications Act and by the Commission's own rules to demonstrate that they are financially qualified. MAP, *et al.* Petition at 13-14. Section 308(b) orders the Commission, in "all applications for station licenses" and "modifications thereof," to require an applicant to present facts about its "citizenship, character, and financial, technical, and other qualifications...." 47 USC §308(b). ALTV and MSTV do not even address these arguments in their Oppositions.

It is particularly outrageous for ALTV to assert that financial disclosure will pose an unreasonable risk of divulging "proprietary" information. ALTV Opposition at 6. The process

of applying for a license to use the broadcast spectrum has always been public, so that the Commission, with the public acting as "private attorneys general," can ensure that the public interest, convenience, and necessity are served. The public and the Commission have, and have always had, a right to know this financial information so they could determine whether applicants are minimally qualified to hold licenses and therefore able to serve their communities of license. Moreover, since this financial showing is likely to be identical or even less intrusive than disclosures broadcasters already make to Wall Street investors or other creditors, ALTV can hardly complain that it would cause a significant burden.

In a similar vein, ALTV argues that disclosure will cause "endless[]" delays as the public files objections, which it calls "quibbling," to the grant of new construction permits. ALTV Opposition at 6. Aside from the hyperbolic portrayal of any delay as being "endless,"² this interpretation ignores the public's well-established right to participate in the licensing process. *See Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). Moreover, it is hardly quibbling to require licensees to provide proof that they are capable of receiving a free gift of this valuable, billion-dollar resource, especially when financially qualified parties who actually could have developed these channels may have been held at bay.³

²As MAP, *et al.* have noted, significant delay in bringing digital TV to the public would be caused by bankrupt licensees holding channels with no true intention to build or operate their station. MAP, *et al.* Petition at 14.

³MAP, *et al.* have little doubt that the majority of licensees will prove qualified, but its concern is with the minority who cannot meet these basic obligations but would merely seek unjust enrichment. The field of applicants for digital licenses has already been limited to existing licensees, excluding other qualified would-be entrants and secondary services. This makes it even more important for the Commission to ensure that the remaining applicants are qualified.

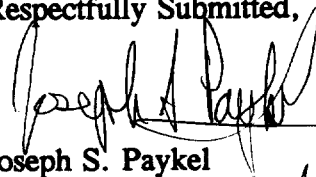
Also unconvincing are ALTV's and MSTV's arguments that the Commission should proceed on an *ad hoc* basis to prevent channel warehousing. This would add far more cost and uncertainty to the licensing process than a simple disclosure rule, since it could take years to discover and rectify instances of malfeasance. Under ALTV's and MSTV's system, financially unsuited parties would have already held digital licenses for years before anyone could determine whether they were warehousing spectrum. Indeed, those parties may have already sold their licenses by the time anyone could discover whether they ever possessed the qualifications to build a station. At that time, even if the public or the Commission were to object to an alleged case of warehousing, they would have to file a much more difficult and much more costly petition to deny a renewal or transfer.⁴ By then, the damage to diversity and to the rapid adoption of digital TV will have already been done.

CONCLUSION

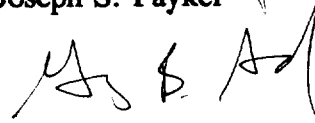
MAP, *et al.* have shown, and ALTV and MSTV have failed even to address, that the Commission is legally bound to adopt new public interest requirements in exchange for the exclusive grant of additional, valuable public spectrum, and also to require a financial qualification showing of all applicants. Furthermore, ALTV and MSTV have shown no legal or policy reasons why the Commission should not follow these mandates. For the foregoing reasons, the Commission should grant MAP, *et al.*'s Petition for Reconsideration of the *Fifth R&O* and grant all other relief as may be just and proper.

⁴It is difficult to imagine how the Commission or members of the public would ever discover a licensee's financial unsuitability in these cases, since under ALTV's and MSTV's request there would be no financial information on file.

Respectfully Submitted,



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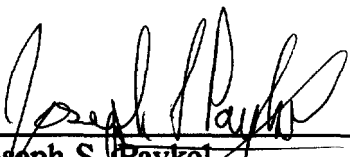
July 31, 1997

CERTIFICATE OF SERVICE

I, Joseph S. Paykel, certify that on this 31st day of July, 1997, copies of this "Reply to Oppositions to Petition for Reconsideration and Clarification" were served by first class, postage prepaid mail, to the following:

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